Supreme Court, U. S.
FILED
FEB 19 1976
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

LUKE G. GALANT
320 East Adams Street
Jacksonville, Florida 32202
Attorney for Petitioners

INDEX

Table of Contents

Page

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions Involved 3

Concise Statement of the Case 3

Argument

Point 1 – Violation of Due Process 5

Point 2 – Violation of Equal Protection 6

Conclusion 7

Cases Cited

Agricultural Delivery Service v. Travelers Insurance Company, (1972, 2DCA), 269 So. (2d) 429 7

Commissioner v. Sunnen, 333 U. S. 591 5

Lyden v. DePiera, (1962, 3DCA), 147 So. (2d) 573 7

Moyer v. Moyer, (1939, 3DCA), 114 So. (2d) 638 7

Smith v. Smith, (1963, 1DCA), 148 So. (2d) 287 7

BLEED THROUGH

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No.

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

DRAFT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners, Division of Vocational Rehabilitation, Depart-

ment of Health and Rehabilitative Services, State of Florida, and Division of Risk Management, Department of Insurance, State of Florida, by their undersigned attorney, pray that a Writ of Certiorari issue to review Order of the Supreme Court of the State of Florida, entered on the 21st day of November, 1975,[1] denying Petition for Writ of Certiorari[2] to review the Amendment to Order[3] entered by the Industrial Relations Commission of the State of Florida on April 24, 1975, which Amendment to Order reversed *sua sponte* the Order[4] of the Judge of Industrial Claims of the State of Florida issued on February 14, 1975, finding that the respondent Thomas did not have a compensable injury and denying respondent's claim.

JURISDICTION

The Supreme Court of the State of Florida by its Order dated November 21, 1975, allowed to stand the Amendment to Order of the Industrial Relations Commission dated April 24, 1975, which Amendment to Order is a violation of the Petitioners' right to due process and equal protection of the laws, which rights are guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State appellate tribunal may, *sua sponte*, without violating due process, reverse the comprehensive de-

---

1. App. A
2. App. B
3. App. C
4. App. D

BLEED THROUGH

cision of a trial judge solely because mechanical failure of a recording machine prevented transcription of the evidence adduced at trial.

2. Whether the appellate tribunals of Florida may without violating the right to equal protection of parties to Workmen's Compensation actions, set aside trial judges' decisions in Workmen's Compensation cases solely because no record of such hearings is available for appeal, while refusing to set aside decisions in common law actions despite the same unavailability of transcript.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment of the Constitution of the United States.[5]

2. Fourteenth Amendment of the Constitution of the United States.[6]

CONCISE STATEMENT OF THE CASE

Respondent employee filed a workmen's compensation claim against petitioners asserting a job related heart attack. By Order of February 14, 1975, the Judge of Industrial Claims, after an extended hearing at which nine witnesses including two physicians testified, denied the claim. The Order was detailed and complete in all respects. Its eleven pages and thirteen paragraphs examined with particularity each and every significant question of fact and law involved in the

---

5. App. E
6. App. F

claim. The Order concluded with the finding "from all of the testimony, and after considering counsel's memos and reviewing the medical reports in the various hospital records, that the claimant did not have a compensable heart attack."

In the process of preparing the record for the respondent's ensuing appeal, it was discovered that the mechanical device used by the Judge to record testimony at the hearing had malfunctioned and thus failed to record any testimony. On April 3, 1975, the Judge of Industrial Claims certified to the Industrial Relations Commission that this malfunction had occurred and requested an extension of time for the filing of the record on appeal. The Industrial Relations Commission responded by issuing an Order, *sua sponte*, dated April 17, 1975, amended April 24, 1975, reversing the Order dated February 14, 1975 and remanding the cause to the Judge of Industrial Claims for rehearing *de novo*. On May 16, 1975 the Petitioners herein filed a Petition for Writ of Certiorari in the Supreme Court of Florida seeking reversal of the Industrial Relations Commission's Order of April 24, 1975. The Petition and the brief in support thereof rested *inter alia* upon the violation of the petitioners' rights to federal constitutional due process and equal protection. That Petition was denied by Order of the Supreme Court of Florida on November 21, 1975, which order found "no departure from the essential requirements of law." This Petition is filed for the purpose of seeking reversal of that Florida Supreme Court Order.

ARGUMENT

1. WHETHER A STATE APPELLATE TRIBUNAL, *SUA SPONTE*, MAY WITHOUT VIOLATING DUE PROCESS, REVERSE THE COMPREHENSIVE DECISION OF A TRIAL JUDGE SOLELY BECAUSE MECHANICAL FAILURE OF A RECORDING MACHINE PREVENTED TRANSCRIPTION OF THE EVIDENCE ADDUCED AT TRIAL?

A presumptively fair and impartial trial was held at which the Respondent employee herein was given a full and complete hearing. Following trial a comprehensive judicial opinion was rendered detailing at length the factual premises upon which the judge arrived at his decision holding Petitioners herein free from liability. That was the last time consideration has been given to the *merits* of this case.

The question for determination here is whether the trial judge's decision may be reversed by a State appellate court simply because no formal, contemporaneous record was kept of the trial. The Petitioners contend it may not, without offending fundamental justice.

An essential doctrine of our vaunted system of ordered justice and due process of law is the doctrine of *res judicata*. That doctrine demands that when a party's legal rights are adjudicated in a complete, valid and conclusive trial, that party may not be subjected to a retrial of the same issues, *Commissioner v. Sunnen*, 333 U.S. 591. The Florida appellate courts in this case have done violence to that doctrine and to due process by requiring Petitioners to undergo a trial *de novo* on issues already conclusively decided. It is the Petitioners' contention that a trial judge's decision may not be reversed

except upon a showing of error. Here, since no error has been shown on the part of any party, vacating the trial judge's decision was a violation of Petitioner's constitutionally guaranteed right to the benefits of the decision in their favor.

This question has not been previously considered by this court. It would substantially contribute to the orderliness of the judicial process to determine whether the right to the benefits of an errorless judgment is as fundamental and necessary as the right to an appeal.

2. WHETHER THE APPELLATE TRIBUNALS OF FLORIDA MAY WITHOUT VIOLATING THE RIGHT TO EQUAL PROTECTION OF PARTIES TO WORKMEN'S COMPENSATION ACTIONS, SET ASIDE TRIAL JUDGES' DECISIONS IN WORKMEN'S COMPENSATION CASES SOLELY BECAUSE NO RECORD OF SUCH HEARINGS IS AVAILABLE FOR APPEAL, WHILE REFUSING TO SET ASIDE DECISIONS IN COMMON LAW ACTIONS DESPITE THE SAME UNAVAILABILITY OF TRANSCRIPT?

In denying the Petitioners' Petition for Writ of Certiorari, the Florida Supreme Court violated the Petitioners' right to Equal Protection of the laws.

Petitioners stood before the Supreme Court of Florida as defendants in a Workmen's Compensation claim. That Court held in effect that when defendants in Workmen's Compensation claims win, but for some reason outside said defendants' control no record of the trial is available for appeal, defendants' prevailing must be vacated and a retrial ensue.

In contrast to this is the treatment of defendants in common law and equity actions in Florida. In those actions it is

BLEED THROUGH

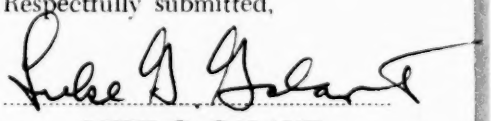
held that "[T]he obligation to furnish a record sufficient to support the appeal is upon the party urging error." *Moyer v. Moyer,* (1959, 3DCA), 114 So. 2d 638. See also *Lyden v. DiPiera,* (1962, 3DCA), 147 So. 2d 573 and *Smith v. Smith,* (1963, 1DCA), 148 So. 2d 287. In *Agricultural Delivery Service v. Travelers Insurance Company,* (1972, 2DCA), 269 So. 2d 429, the court noted that the lower court had misconstrued a prior mandate to attempt to produce a record for appeal. "It did not direct, nor did it permit, the granting of a new trial *per se.* Indeed, the *parties had their day at trial* . . ." [Emphasis added].

Thus we see that the appellate courts of Florida apply one rule against appellees in Workmen's Compensation cases but a different rule for appellees in other types of civil actions. This arbitrary distinction is based upon no discernible or reasonable classification but rather represents an invidious and needless discrimination against a certain class of litigants in violation of the right to equal protection of the laws.

CONCLUSION

Accordingly, Petitioners pray that this Honorable Court grant their Petition for Writ of Certiorari herein filed to review Order of the Supreme Court of the State of Florida.

Respectfully submitted,



LUKE G. GALANT
320 East Adams Street
Jacksonville, Florida 32202
Attorney for Petitioner

APPENDIX A

SUPREME COURT OF FLORIDA

JULY TERM, 1975

FRIDAY, NOVEMBER 21, 1975

CASE NO. 47,336

INDUSTRIAL RELATIONS COMMISSION
DIVISION OF VOCATIONAL
REHABILITATION, DEPARTMENT OF
HEALTH AND REHABILITATIVE
SERVICES, STATE OF FLORIDA,
and DIVISION OF RISK MANAGEMENT,
DEPARTMENT OF INSURANCE, STATE
OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and
INDUSTRIAL RELATIONS COMMISSION,
STATE OF FLORIDA,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.*, 307 So. 2d 166 (Fla. 1974).

The Motion for Attorney's Fee filed by attorney for Respondent Thomas is granted and said attorney is hereby allowed a fee of Three Hundred Fifty Dollars ($350) for services in this court, said sum to be paid to said attorney by petitioners within fifteen days after final disposition of this cause.

ADKINS, C.J., ROBERTS, OVERTON, ENGLAND AND SUNDBERG, JJ., CONCUR

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.
By: Kay O. Yent
Deputy Clerk

Y

CC: Hon. Verna Martin, Clerk

Hon. Luke G. Galant
Hon. George L. Proctor
Hon. Verna Martin, Clerk

BLEED THROUGH

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

DIVISION OF VOCATIONAL
REHABILITATION, DEPARTMENT
OF HEALTH AND REHABILITATIVE
SERVICES, STATE OF FLORIDA,

Employer,

and

DIVISION OF RISK MANAGEMENT,
DEPARTMENT OF INSURANCE,
STATE OF FLORIDA,

Carrier,

Petitioners,

-vs-

WILBUR KENYARD THOMAS,

Employee,

and

INDUSTRIAL RELATIONS COMMISSION,
STATE OF FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
INDUSTRIAL RELATIONS COMMISSION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF FLORIDA:

Your petitioners, Division of Vocational Rehabilitation, employer, and Division of Risk Management, carrier, bring this their petition for a writ of certiorari against Wilbur Kenyard Thomas, employee, and the Florida Industrial Relations Commission, respondents, saying:

1. This is an application for a writ of certiorari under Rules 4.1 and 4.5 c of the Florida Appellate Rules providing for certiorari to review compensation orders of the Florida Industrial Relations Commission. It is anticipated that the available original record of the proceedings before the Judge of Industrial Claims will be transmitted to this Honorable Court by the Clerk of the Florida Industrial Relations Commission as required by law, even though the Industrial Relations Commission apparently never saw, much less considered, the Order of the Judge of Industrial Claims which it reversed. To facilitate consideration of this petition, however, petitioners are attaching hereto copy of the Judge of Industrial Claims' Order of February 14, 1975, of his Certificate of April 3, 1975, of the Industrial Relations Commission's Order of April 17, 1975, and of the Industrial Relations Commission's Amended Order of April 24, 1975.

2. The rendition date of the Florida Industrial Relations Commission's Order under review is April 17, 1975, as amended by Order of April 24, 1975. The petitioners are the employer and its carrier. The respondents are respectively the employee and the Florida Industrial Relations Commission, all as designated under and pursuant to the Workmen's Compensation Law of the State of Florida, Chapter 440, Florida Statutes.

BLEED THROUGH

3. Respondent contended that he sustained a compensable heart attack. Petitioners controverted. A detailed and extensive hearing was held before the Judge of Industrial Claims. Following this hearing at which nine witnesses testified, the Judge of Industrial Claims entered an eleven-page Order dated February 14, 1975. That Order extensively detailed the Judge's findings of fact and concluded that respondent's heart attack was not compensable.

4. In the process of preparing the record for respondent's Application For Review, it was discovered that the Voicewriter used by the Judge of Industrial Claims to record the testimony at the hearing had malfunctioned and thus failed to record any testimony. On April 3, 1975, the Judge of Industrial Claims certified to the Industrial Relations Commission that this malfunction had occurred and requested an extension of time for the filing of an appeal. The Industrial Relations Commission responded by issuing an Order, *sua sponte*, dated April 17, 1975, amended April 24, 1975, reversing the Order dated February 14, 1975, and remanded the cause to the Judge of Industrial Claims for rehearing. This petition is filed for the purpose of seeking a reversal of the Industrial Relations Commission's Order dated April 17, 1975, as amended April 24, 1975.

5. The issue involved in this petition is whether the Industrial Relations Commission, sitting as an appellate body, acted with proper regard to fundamental justice, to the essential requirements of law, and to due process, both under the Constitution of the State of Florida and the United States Constitution, when it ordered a hearing *de novo* simply because no transcript was available for appeal, even though an eleven-page Order reciting the testimony and finds was available. Petitioners submit that *all* relevant precedents indicate that

the Commission erred in ordering the hearing *de novo* and furthermore, that such an Order was violative of petitioners' rights to justice and due process of law. See *Agricultural Delivery Service, Inc. vs. Travelers Insurance Co.*, 269 So.2d 429 (Fla.App. 1972); *Travelers Insurance Co. vs. Agricultural Delivery Service*, 262 So.2d 210 (Fla.App. 1972); *Smith vs. Smith*, 148 So.2d 287 (Fla. App. 1963); and *Lyden vs. DePiera*, 147 So.2d 573 (Fla.App. 1963).

6. This petition should be granted to prevent execution of an Order which constitutes a departure from the essential requirements of the law and is therefore illegal. Petitioners have suffered through a complete hearing after which they were found to be free of liability for the claim made. To rehear the claim as ordered by the Commission would be a violation of the rule of *res judicata*, a rule which is a basic foundation of due process of law. The fundamental ideas of justice which are our heritage require that petitioners not be placed in jeopardy again by a *de novo* hearing. It should be further noted that the Florida Supreme Court has apparently never passed on the issue involved in this case, although the District Courts of Appeal have decided the issue numerous times (in accordance with the views of petitioners).

WHEREFORE, petitioners urge that the Order of the Florida Industrial Relations Commission be reversed and that the Order of the Judge of Industrial Claims be reinstated.

Respectfully submitted,

DAWSON, GALANT, MADDOX,
SULIK & NICHOLS, P.A.
320 East Adams Street
Jacksonville, Florida 32202

BLEED THROUGH

By /s/ LUKE G. GALANT
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing was mailed to George L. Proctor, Attorney for Employee, and to the Florida Industrial Relations Commission, this 6th day of May, 1975.

/s/ LUKE G. GALANT
Attorney

APPENDIX C

State of Florida
INDUSTRIAL RELATIONS COMMISSION

CL. NO. 262-26-6427

D/A 10/29/74

(Filed April 24, 1975)

Wilbur Kenyard Thomas,

Appellant

v.

Division of Vocational
Rehabilitation

Division of Risk Management,

Appellees

Bruce, Smith and Proctor, Jacksonville, for Appellant
Luke G. Galant, Jacksonville, for Appellees

AMENDMENT TO ORDER

Per Curiam.

The Industrial Relations Commission's Order entered in this cause on April 17, 1975, is amended to read as follows:

> This cause comes before the Industrial Relations Commission upon claimant's Application for Review of the Judge of Industrial Claims' Order dated February 14, 1975. The Judge of Industrial Claims has

BLEED THROUGH

certified that, because of mechanical failure, it will be impossible to make a transcription of the evidence adduced in the hearing from which that Order arose.

Because the Order herein is unsupported by a record, the Industrial Relations Commission, *sua sponte*, reverses the Order dated February 14, 1975 and remands jurisdiction of this cause to the Judge of Industrial Claims for the purpose of conducting such further proceedings as are necessary and proper.

It is so ordered.

SEAL

INDUSTRIAL RELATIONS COMMISSION

LEONARD A. CARSON, Chairman
ELMER O. FRIDAY, JR., Commissioner
LEANDER J. SHAW, JR., Commissioner

This is to certify that on this April 24, 1975, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy sent by certified mail to each interested party at his last known address.

INDUSTRIAL RELATIONS COMMISSION

BY /s/ V. MARTIN

Clerk

(Title)

cc: Thomas J. Carroll,
Judge of Industrial Claims

APPENDIX D

STATE OF FLORIDA DEPARTMENT OF COMMERCE
DIVISION OF LABOR AND EMPLOYMENT
OPPORTUNITIES
BUREAU OF WORKMEN'S COMPENSATION

CLAIM NO.: 262-26-6427

DATE OF ACCIDENT: 10/29/74

EMPLOYEE: WILBUR KENYARD THOMAS
6153 Ortega Farms Blvd.
Jacksonville, Florida 32210

Represented by: GEORGE L. PROCTOR
Barnett Bank Building
Jacksonville, Florida 32202

EMPLOYER: DIVISION OF VOCATIONAL
REHABILITATION
1325 San Marco Avenue
Jacksonville, Florida 32207

CARRIER: DIVISION OF RISK MANAGEMENT
Larson Building
Tallahassee, Florida 32304

Represented by: LUKE G. GALANT, ESQUIRE
320 East Adams Street
Jacksonville, Florida 32202

BLEED THROUGH

COMPENSATION ORDER
OF
JUDGE OF INDUSTRIAL CLAIMS
THOMAS J. CARROLL

THIS CAUSE came on to be heard before me, the undersigned Judge of Industrial Claims, on January 28, 1975, and pursuant to the evidence and testimony presented as well as the stipulations between the parties, I hereby make the following findings of fact:

1. That the Judge of Industrial Claims has jurisdiction of the parties and the subject matter hereto.

2. Claim was made that a pre-existing heart condition was aggravated by stress caused by additional work undertaken by the claimant for this employer, which stress aggravated the pre-existing condition and produced a heart attack. Claim was made for temporary total benefits since October 29, 1974 and continuing, and for payment of medical and hospital expense, plus award of attorney fees.

3. The claim was defended on the grounds that the claimant had a long-standing history of coronary insufficiency; that there was no unusual stress or strain prior to the heart attack of October 29, 1974; that any stress the claimant may have sustained was related to a denied promotion; that there was no causal connection between the heart attack and the employment; and that the claim was denied en toto.

4. It was stipulated between the parties that the claimant's average weekly wage was $233.20, with a corresponding compensation rate of $80.00; that the claimant was in the employment of this employer on October 29, 1974, without admitting that an accident occurred; that no compensation benefits had

been paid; that certain hospital records covering earlier admissions of the claimant to St. Vincent's hospital, including doctors' reports, and certain records, would be admitted in evidence; and that in the event attorney fees were applicable, counsel would attempt to stipulate to a fixed fee or otherwise file affidavits.

5. In making my findings of fact and final determination in this cause, I have carefully considered all of the evidence presented before me, as well as the candor and demeanor of the witnesses who testified. I have carefully weighed and considered all the testimony and evidence and have resolved any conflicts therein.

6. I find the claimant is 54 years of age, is married, and his wife and two children reside with him in their home. I find he attended high school in Lake Butler, Florida, but completed his high school equivalency while in the Navy. I find he left high school and entered the C.C.C., serving in Nevada and then was in the Navy for a period of time during which he completed his high school equivalency. I find that thereafter he was employed by various employers, including Rose Construction Company and the Jacksonville Journal; that he attended college from 1951 to 1955, obtaining an A.B. degree, with a major in history, and thereafter he taught history in various schools. I find he had special teaching skills with retarded children and eventually obtained employment in Jacksonville, teaching, and then in August of 1966 he entered the employment of the Florida State Department of Vocational Rehabilitation where he worked until his heart attack on October 29, 1974.

7. I find that in 1959 the claimant had 80% of his stomach removed and has since had gastrointestinal problems, and he

BLEED THROUGH

had two procedures for lip cancers performed in 1961 and 1962. I find that in 1965 there was an episode of chest pain when he was seen at St. Vincent's hospital by his family doctor, Doctor Foley, and that he also had chest pains following an automobile accident in 1970, and developed pneumonia following that accident. I find he has suffered occasional chest pain since 1965 and if it would be severe he would report the matter to his family doctor, Dr. Foley.

8. I find that in 1973 the claimant was active as a counselor in a school problem, dealing with retarded children, and had a secretary assigned to him to assist him. I find that in October of 1973 his caseload was increased when he was assigned some college cases of handicapped people, and his workload was fairly regular up to May to 1974. I find that at that time he was temporarily promoted to acting supervisor which placed him in charge of eight counselors who, in turn, had charge of numerous students in the program, and that this increased his workload in that he continued to do his former work as a counselor in addition to undertaking the new supervisory duties, and he would have to fill in as necessary when any counselor positions were unfilled. I find his workload was further complicated by extension of responsibility into adjacent counties, surrounding Duval County, and that as a result of this, the claimant increased his work day, arriving at the office at 7:30 a.m. instead of at 8:00 a.m., usually working through his lunch hour, and remaining until 5:20 or 5:30 in the evening instead of departing at 5:00 p.m. I find he estimated an extra 10 hours of work per week and would occasionally take work home on the weekends also.

9. I find that after being temporarily promoted and accepting the additional work duties and assignments, the claimant was kept more or less in a case of suspension by not knowing

whether or not his promotion was finally approved. I find that in July he received a check containing a pay raise, indicating the promotion had been approved, and another similar check in August with a pay increase, but then his pay reverted to its original level, and he gathered from this that his promotion had not been finally approved. I find he was upset enough to cause him to correspond with the Governor and with the Director of the Department, voicing a grievance concerning the fact that he was not permanently promoted. I find that he undertook a grievance procedure, but was still continuing in his temporary position as acting supervisor, when he departed for a planned, scheduled, convention in Las Vegas, Nevada some two weeks prior to October 28, 1974. I find that his wife and children accompanied him to the convention and that during this two-week period he was away from the office and on a less strenuous routine. I find that he returned to the office and he indicated that he worked Monday, October 28, 1974, on accumulated paper work, and he was also in the office on Tuesday, October 29, 1974 attending to his paper work, when he experienced a feeling of a lump in his chest going up in his throat, and he asked his secretary to call Dr. Foley for an appointment. I find he felt ill enough to immediately start out for the doctor's office but passed out in the lobby of the building and was taken by ambulance to the emergency room at St. Vincent's Hospital, where he came under the care of Dr. Foley. I find that following a series of treatment, hospitalizations, and tests, open heart surgery was eventually performed on December 30, 1974, and the claimant was discharged from the hospital on January 8, 1975. I find the surgery was performed by Dr. Batchelder, and that the claimant continues under the care of Doctors Foley and Batchelder, and further procedures are necessary before the outcome of this surgery is finally known.

BLEED THROUGH

I find he will not be able to return to work for at least three months following the heart surgery. I find that some of the hospital and doctor bills have been paid by a Blue Cross-Blue Shield policy, but the pertinent bills were not available on the day of the hearing, but it was agreed they would be admitted in evidence when available.

10. I find the claimant's supervisor indicated that he was a conscientious worker and was concerned about his work performance. I find that he noted the impact on the claimant when he realized that his promotion was not finally approved. I find, in considering the fact that the promotion was not finally approved. I find, in considering the fact that the promotion was not finally approved, that the claimant was aware of this for some period of time prior to his heart attack and prior to his departure to the convention. I find that the regulations, technically, required that he have a Masters Degree for this promotion. I find that while the Grievance Committee hearing was continuing, these other occurrences intervened. I find the Grievance Committee eventually recommended that the claimant be retained in his position on a probationary status for a period of six months and if his work was satisfactory that he be kept permanently in that position, but the head of the department did not accept the recommendation of the Grievance Committee, but this was not known until after the heart attack had occurred. I find that on the morning of October 29, 1972, a number of people visited the claimant in his office and observed him to be about his usual work and appearing normal and functioning and conversing in a normal manner. I find the last person to be in his presence, prior to his becoming ill, was his former secretary, Patricia L. Jensen who visited at the building that day from her usual office at Englewood High School.

I find that she observed that he did not appear to be in any stress and they conversed for about ten minutes, discussing various matters, including his trip to Las Vegas. I find he suddenly began to appear ill and said that his stomach was hurting and asked her to make a doctor's appointment for him, and she did so, and about that time he indicated he wanted to go on to the doctor's office and she accompanied him, intending to drive him to the doctor's office, but he passed out in the lobby of the building and was taken on by an ambulance. I find another secretary had conversed with him earlier in the day and he appeared normal to her during the course of their conversation. I find that one of the counselors, that the claimant supervised, identified as Janet Sheaffer, also visited with the claimant earlier that morning before he became ill and she had a number of complaints and matters that ordinarily might be upsetting to a supervisor who had just returned from a convention trip, but I find from the testimony of Patricia L. Jensen that the claimant appeared normal and was not upset in his appearance at the time he initially had his stomach complaints in the office on the morning of October 29, 1974.

11. I find Dr. Joseph D. Foley is a general practitioner who has seen the claimant down through the years since August 27, 1965. I find that some of his earlier notations and records refer to high blood pressure situations and complaints of chest pains. I find in addition to the heart and chest pain complaints, this doctor had treated the claimant for an indigestion problem, resulting from his earlier ulcer condition, for flu, urinary problems, headache complaints and routine physical checkups. I find that when the doctor saw him in the emergency room at St. Vincent's, the claimant had poor heart rhythm and the doctor suspected a possible coronary occlu-

BLEED THROUGH

sion and it later developed that the claimant had in fact had an acute myocardial infarction. I find that the infarction was treated during the first hospitalization and the claimant was released with the understanding he would be readmitted later for catheterization, and this was done earlier than planned because he had continuing complaints, and these studies were completed before Christmas. I find he was then released from the hospital, and then admitted to the hospital again on December 27, 1974, and during this admission Doctor Batchelder performed open heart surgery with bypasses to the three main coronary arteries. I find that it was Dr. Foley's opinion that the claimant's additional workload caused him stress and strain and this was a factor precipitating the myocardial infarction that occurred on October 29, 1974. I find a reasonable expert witness fee for Dr. Foley's appearance is $50.00.

12. I find that Dr. David R. Moomaw is an internist, specializing in cardiology, and saw the claimant in consultation with Doctor Foley while he was at St. Vincent's hospital. I find this doctor obtained some information from the claimant and some from his wife and there was some reference to the history of coronary pain during a trip to a western state, but the claimant denied such complaints during his recent trip to Las Vegas and indicated it had been more than 35 years since he had last previously been in a western state. I find that there is some confusion in this portion of the history. I find that Dr. Moomaw was of the opinion that the three major factors producing myocardial infarctions are high blood pressure, cigarette smoking and blood lipids. I find the fact that the claimant had a mild degree of diabetes would also be a risk factor but a minor risk factor when considered along with the three major risk factors. I find from this doctor's

testimony that the claimant had a long standing, pre-existing condition, resulting in clogging of the three main coronary arteries and preventing them from furnishing adequate blood and oxygen supply to the heart muscle. I find that it was this doctor's opinion that the fact that the claimant undertook a greater workload for a period of five months prior to the myocardial infarction would not be a factor that would be a probable precipitating cause, in that the stress remained constant over a period of time. I find this doctor was of the opinion that if he was subjected to a particularly stressful situation and the heart attack immediately followed this stress, that then there would be more basis for saying there was a casual relationship, but not for a heart attack following fairly uniform stress for a period of five months and resulting from prolonged working hours. I find the fact that the heart attack occurred after a two-week break from the work, when the claimant was more or less in a vacation status while on a trip to the west, attending a convention, would also detract from the probability that the myocardial infarction was precipitated by stress, resulting from extra working hours, in that the attack occurred following a rest period rather than a stress period.

13. I find from all of the testimony, and after considering counsel's memos and reviewing the medical reports in the various hospital records, that the claimant did not have a compensable heart attack. I find that there was no direct trauma to the heart, producing a heart attack. I find no isolated or continuing stressful situation immediately preceding the heart attack that could be considered a precipitating cause of the heart attack. I find I should accept Doctor Moomaw's opinion and reject Doctor Foley's opinion. I have accepted Doctor's Moomaw's opinion that the additional

BLEED THROUGH

working hours and additional workload undertaken by the claimant for a period of five months would not be sufficient to precipitate a heart attack, and I also find this applies to any emotional upset or strain the claimant may have subjected himself to as a result of his disappointment over the non finality of his promotion.

ACCORDINGLY, I find that the claim filed herein should be and the same is hereby denied.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 14th day of February, 1975.

S E A L

/s/ THOMAS J. CARROLL
Judge of Industrial Claims

cc: to Parties

THIS IS TO CERTIFY that the foregoing order was entered on the 14th day of February, 1975, and that a copy thereof was sent on said date by certified mail to the claimant and the employer and by regular mail to all other interested parties, at the last known address of each.

/s/ MIRIAM L. BYRD

[Appendix E]

AMENDMENT V

"No person shall be *** deprived of life, liberty, or property, without due process of law ***"

[Appendix F]

AMENDMENT XIV

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LIBRARY

Supreme Court, U. S.
FILED
MAR 18 1976
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD A. WHITE
902 Barnett Bank Building
Jacksonville, Florida 32202
Counsel for Respondent, Wilbur Kenyard Thomas

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
CONCISE STATEMENT OF THE CASE	2
ARGUMENT	5
Point 1 – Whether it is a violation of due process for an industrial relations commission to reverse and remand a decision of a judge of industrial claims which is unsupported by a record?	4
Point 2 – Whether it is a violation of equal protection for an industrial relations commission to reverse and remand a decision of a judge of industrial claims which is unsupported by a record?	10
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases *Page*

Agricultural Delivery Service v. Travelers Insurance Company, 269 So. 2d 429 (2d DCA Fla. 1972) 11

Ebersole v. State, 428 P. 2d 947 (Idaho 1967) 8

Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) 13

Hunter v. Zenith Dredge Co., 19 N.W. 795 (Minn. 1945) 7, 8

Lieber v. Morris Lieber, 168 So. 2d 313 (Fla. 1964) ... 5, 13

Mallett v. North Carolina, 181 U.S. 597, 21 S. Ct. 730, 45 L. Ed. 1015 (1901) 12

Missouri v. Lewis, 101 U.S. 221 (1879) 12

Moyer v. Moyer, 114 So. 2d 638 (3d DCA Fla. 1959) 10

Ohio Bell Tel. Co. v. Public Utilities Comm., 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1936) 9

Wardell v.Tropicana Products, Inc., 256 So. 2d 212 (Fla. 1971) 6, 13

Statutes

Florida Statutes, Section 440.29(2) 4, 10

BLEED THROUGH

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Wilbur Kenyard Thomas, opposes the Petition for a Writ of Certiorari filed before this Court by Petitioners, Division of Vocational Rehabilitation, Department of Health and Rehabilitative Services, State of Florida, and Division of Risk Management, Department of Insurance, State of Florida. The reports of opinions delivered in the Courts below as set

forth in the Petition for a Writ of Certiorari is adopted by Respondent.

JURISDICTION

Respondent takes no issue with the statement of Petitioners that jurisdiction is dependent on whether rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution have been violated by the decisions below.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners have correctly stated and in the Appendix to the Petition for Certiorari correctly set out the constitutional provisions involved.

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of due process for an Industrial Relations Commission to reverse and remand a decision of a Judge of Industrial Claims which is unsupported by a record?

2. Whether it is a violation of equal protection for an industrial relations commission to reverse and remand a decision of a Judge of Industrial Claims which is unsupported by a record?

CONCISE STATEMENT OF THE CASE

The appendix is affixed at the end of the Petition for Writ of Certiorari filed by Petitioners rather tl an separately bound.

It contains pages 1a through 21a and will be referred to herein as "App." followed by the page number.

The case arose from a workmen's compensation claim filed by Respondent Thomas. A hearing was held on that claim on January 28, 1975 before the Honorable Thomas J. Carroll and a compensation order was entered on February 14, 1975.[1] In an ensuing appeal to the Florida Industrial Relations Commission it was revealed that there had been mechanical failure in the recording device used at the hearing and therefore it was impossible to make a transcription of the testimony at the hearing.

On the basis that there was no record on which to ascertain whether the Compensation Order was supported by the testimony, the Industrial Relations Commission remanded jurisdiction back to the Judge of Industrial Claims "for the purpose of conducting such further proceedings as are necessary and proper."[2]

Petitioners herein, the employer of respondent and the insurance carrier for the employer, filed a petition with the Florida Supreme Court for a writ of certiorari.[3] That petition was denied by the Florida Supreme Court[4] and the employer and carrier have now petitioned this Court for a writ of certiorari.

---

1. App. 11a - 19a
2. App. 8a - 9a
3. App. 3a - 7a
4. App. 1a - 2a

ARGUMENT

1. WHETHER IT IS VIOLATION OF DUE PROCESS FOR AN INDUSTRIAL RELATIONS COMMISSION TO REVERSE AND REMAND A DECISION OF A JUDGE OF INDUSTRIAL CLAIMS WHICH IS UNSUPPORTED BY A RECORD?

A formal hearing was held on the workmen's compensation claim of respondent appealed from the ensuing compensation order. The Judge of Indus trial Claims certified that because of a mechanical failure of the recording device used at the hearing it was impossible to make a transcription of the testimony. Therefore, the Florida Industrial Relations Commission remanded the case back to the Judge of Industrial Claims for the purpose of conducting "such further proceedings as are necessary and proper."

Under Florida law it is the duty of the State to provide for reporting of the proceedings and preparation of the record of the hearings. Florida Statutes, Section 440.29(2) provides:

> "(2) Hearings before the division shall be open to the public and *shall be reported,* and the division is authorized to contract for the reporting of such hearings. *The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before it* and shall be permitted to charge for transcripts of testimony and copies of any instrument the same fees as are allowed by law to reporters and clerks of courts of this state for like services."
> (emphasis supplied)

The cause was remanded because the respondent's Application for Review could not be acted upon by the Industrial

BLEED THROUGH

Relations Commission without a record of the proceedings before the Judge of Industrial Claims. It was the responsibility of the Department of Labor to provide that record, not the respondent and he can in no way be held at fault for the lack of a record.

The Supreme Court of Florida has previously ruled in two compensation cases that lack of a record requires a hearing de novo because there can be no review without a transcript. In the first case it was held:

> "The respondent employer filed timely application for review of the award for permanent partial disability compensation herein, and subsequently learned that it would be impossible to obtain a transcript of testimony because of the disappearance of the reporter, illegibility of his notes, and lack of other record of the proceedings. Motion for hearing de novo was thereupon filed.
>
> "This motion was, in our opinion, very properly granted in conformity with the affirmative requirements of the compensation law, F.S. Sections 440.29(2), 440.02(8) and 440.25, F.S.A., that testimony shall be reported and orders reviewed upon a transcript."
>
> *Lieber v. Morris Liebe, Inc.*
> 168 So. 2d 313, (Fla. 1964).

The second and more recent case involved a situation similar to that presented in this cause. The hearing before the Judge of Industrial Claims was recorded on tape and the reporter was unable to transcribe the testimony without many omissions for inaudible sections of the tape recording. The Court held:

"The instant case bears a striking similarity to the situation in *Lieber v. Morris Lieber, Inc.*, 168 So. 2d 313 (Fla. 1964). In that case, the employer filed timely application for review with the Commission and subsequently it was learned that it would be impossible to obtain a transcript of the testimony taken before the Claims Judge because of the disappearance of the reporter, the illegibility of his notes, and lack of other record of the proceedings, . . .

"Turning to the case sub judice, we observe that the hearing before the Industrial Claims Judge was recorded on tape. As transcribed in the record, this hearing consists of 15 typed pages. In the course of this 15 page transcript there are no less than 87 places at which the tape proved inaudible to the transcriber.

"We can only conclude that the affirmative requirement of the compensation law that testimony shall be reported and orders reviewed upon a transcript is not met by this record. We do not think that Lieber can be distinguished on the theory that there the transcript was unobtainable, whereas in the instant case a partial transcript was submitted. A partial transcript as incomplete as that submitted here is of no more value than would be an absent transcript."

Wardell v. Tropicana Products, Inc., 256 So. 2d 212, 213-214 (Fla. 1971)

Thus the decision of the Supreme Court of Florida, denying the petitioner's application for a writ of certiorari was in conformity with the established law of Florida in cases where no record or only a partial record was available for the reviewing tribunal.

BLEED THROUGH

Petitioners now ask this Court to consider and determine that the law of Florida in that regard deprives them of due process of law.

However, it is the contention urged by petitioners that would result in a violation of due process rights not the decisions of the Supreme Court of Florida. Respondent appealed the adverse ruling of the Judge of Industrial Claims and sought review by the Industrial Relations Commission. He was entitled to have a record furnished by the State in order that the reviewing authority could determine whether or not the decision of the Judge of Industrial Claims was correct and supported by the evidence. Absent such a record respondent would be deprived of the basic right of appeal.

This situation has been considered from precisely that standpoint by the Supreme Courts of two states. The Supreme Court of Minnesota in a compensation case held:

> "Due process requires that the evidence on which an agency, board, or commission bases its findings be ascertainable. This court must have the necessary data on which to determine the correctness thereof. A claimant for workmen's compensation, under §176.61 (§4320), is guaranteed a right of review by the Supreme Court, which may examine findings of fact and determine whether they have a sufficient foundation in the evidence. Since no transcript of the evidence is required to be filed by the medical board under L. 1943, c. 633, §11, it is apparent that claimant's right of appeal or review is effectively denied thereby.
>
> "The words 'due process of law' when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our

system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case, and the right of appeal from or review of a decision regarded by a litigant as unjust. . . .

"Our power to review findings of the medical board and to determine whether they are supported by sufficient foundation in fact is accordingly frustrated, because such findings are binding on the commission and the board is not required, under the statute, to file with its report a transcript of the evidence, testimony, or exhibits upon which such findings are based. Thus a claimant is denied the right of review guaranteed him by the workmen's compensation law, §176.61 (§4320), and by the due process clauses of both the state and federal constitutions. Const. Minn. art. 1, §2; Const. U.S. Amend. 14."

Hunter v. Zenith Dredge Co., 19 N.W. 2d 795, 799 - 800, (Minn. 1945)

Similarly, the Supreme Court of Idaho in *Ebersole v. State*, 428 P. 2d 947, 953 (1967) held:

"When there is such a breakdown in the application of established procedures, as is reflected by this record, which necessitated resort to parol evidence of court officials and of the appellant himself to establish what took place in a Court of record, there is such a lack of fundamental fairness and deviation from established procedure as to necessitate the conclusion that appellant has not been afforded the protection of the due

BLEED THROUGH

process clauses of the Constitutions of the United States and this State."

In a rate case this Court through Mr. Justice Cardozo said:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record, . . .
>
> "This is not the fair hearing essential to due process. It is condemnation without trial. . . .
>
> "From the standpoint of due process - the protection of the individual against arbitrary action - a deeper vice is this, that even now we do not know the particular evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown, there is no way to find them out. . . .
>
> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"
>
> *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292, 300, 302-303, 57 S. Ct. 724, 728, 730, 81 L. Ed. 1093, 1099-1101 (1936)

Here, on the same issue, the Industrial Relations Commission remanded the cause on the grounds of lack of a record. The contention of petitioners that they should be entitled to the benefits of a compensation order which cannot be re-

viewed is without legal or constitutional merit. The tribunals below acted to preserve the only due process rights which were in jeopardy, those of respondent. These actions were constitutionally correct.

2. WHETHER IT IS A VIOLATION OF EQUAL PROTECTION FOR AN INDUSTRIAL RELATIONS COMMISSION TO REVERSE AND REMAND A DECISION OF A JUDGE OF INDUSTRIAL CLAIMS WHICH IS UNSUPPORTED BY A RECORD?

Petitioners have cited four Florida District Court of Appeals cases for the proposition that in civil cases the burden is on the appellant to produce a record for appeal. They contend that to impose a different rule in workmen's compensation matters denies them equal protection of the laws.

This ignores the distinction in the reporting requirements at workmen's compensation hearings and civil trials. By statute, the state agency conducting a compensation hearing is responsible for the reporting and preparation of the record of the hearing. *Florida Statutes*, Section 440.29(2). In civil trials there is no such provision and the burden falls on the parties to provide for a reporter, moreover in one of the cases cited by petitioners the Court explicitly points out that the Florida Appellate Rules provide for an alternative to a stenographic transcript:

> "The appellant urges as an extenuating circumstance for his failure to bring us a proper record that there was no court reporter present at the time of taking of the testimony. *It is not in keeping with the orderly processes of law that there should be a time when an appeal is impossible because a court reporter was not employed by one of the parties. We point out that a*

BLEED THROUGH

> *stenographic transcript of the testimony is not necessary for an appeal. Rule 3.6(h), Florida Appellate Rules, 13 F.S.A., not only provides for the use of narrative statements of the testimony, but frankly endeavors to encourage such simplified appeals." Moyer v. Moyer,* 114 So. 2d 638, 638 - 639 (3rd DCA Florida 1959) (emphasis supplied)

There being no similar provision in workmen's compensation matters for a narrative statement, and further it not being the burden of the parties to provide for reporting of the proceedings the distinction between the two types of cases is clear.

It is also of interest to observe that the Court in that case took particular note of the basic unfairness present where an appeal is impossible because a transcript is unavailable. Yet this is exactly what petitioners urge this Court to bring about; and to do it in a posture where the lack of a record is in no way due the fault or neglect of the respondent.

Moreover, in *Agricultural Delivery Service v. Travelers Insurance Company,* 269 So. 2d 429 (2d DCA, Fla. 1972), principally relied upon by petitioners, the written opinion reflects an entirely different posture of the case than that urged by petitioners. That was a case where the District Court of Appeals of Florida remanded the action to the trial court to reconstruct the record and the trial court erroneously construed that mandate to require a trial de novo. The District Court thereupon directed the trial judge to "withdraw his order for new trial and simply follow our prior mandate to reconstruct original testimony." (p. 430)

This hardly supports petitioners' contention of an invidious discrimination. In order to establish an equal protection vio-

lation it is incumbent on petitioners to establish an arbitrary discrimination against persons in similar circumstances. A state has wide latitude in prescribing the procedural regulation of its courts. As held by this Court in *Mallett v. North Carolina*, 181 U.S. 597, 598, 21 S. Ct. 730, 45 L. Ed. 1015, 1020 (1901) in quoting from the prior case of *Missouri v. Lewis*, 101 U.S. 221 (1879):

> "Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefits of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of

BLEED THROUGH

> trial by jury, and on the other no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

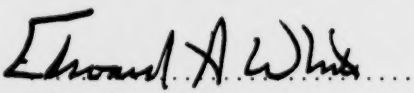
Petitioners have not and cannot show any discrimination between themselves and other parties to Florida workmen's compensation matters. In point of fact they have received the identical treatment accorded all parties to compensation matters by the Florida Courts. *Lieber v. Morris Lieber, Inc.*, supra; *Wardell v. Tropicana Products, Inc.*, supra. There is no discrimination between petitioners and other persons in like circumstances.

Had petitioner's prevailed below, however, serious equal protection issues would have been presented. Not only due to the difference in treatment between that accorded to respondent and other parties to compensation matters where there is no record, but also due to the stifling of respondent's right to appeal. Since *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) the right of an indigent defendant to a transcript in criminal cases has been guaranteed as a part of his equal protection rights. In this case respondent was entitled to a record as a matter of law in order to perfect his appeal. Had petitioners prevailed, respondent's right of appeal would have been just as effectively precluded and frustrated as that of the indigent criminal defendant who could not afford to purchase a transcript. Had that occurred the equal protection violation of respondent Thomas' rights would have been clear.

CONCLUSION

The order of the Supreme Court of Florida guaranteed rather than violated due process and equal protection rights and the Petition for Writ of Certiorari should be denied.

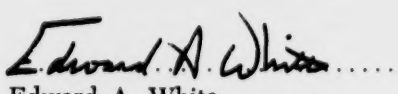
Respectfully submitted,



Edward A. White
902 Barnett Bank Building
Counsel for Respondent, Thomas
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that three copies of the foregoing printed brief of Respondent Thomas have been delivered at the office of Luke G. Galant, Esquire, 320 East Adams Street, Jacksonville, Florida, counsel of record for petitioners and three copies thereof have been served by mail by depositing the same in a United States mail box, with first class postage prepaid addressed to Industrial Relations Commission, State of Florida Department of Commerce, 1321 Executive Center Drive - East, Tallahassee, Florida 32301, respondent, this 17th day of March, 1976.



Edward A. White
Counsel of Record for Respondent
Thomas

BLEED THROUGH

LIBRARY
SUPREME COURT, U. S.

FILED
APR 5 1976
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITIONERS' REPLY BRIEF

LUKE G. GALANT
320 East Adams Street
Jacksonville, Florida 32202

Attorney for Petitioners

BLEED THROUGH

INDEX

Page

Colvin v. State, Department of Transportation, 311 So.(2d) 366 6

Pierce v. Piper Aircraft Corporation, 279 So.(2d) 281 .. 2

Scholastic Systems, Inc. v. LeLoup, 307 So.(2d) 166 .. 3

In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITIONERS' REPLY BRIEF

For a defendant in a litigated matter to win its case but be forced to try it again, de novo, simply because the device recording the testimony failed is bad enough, but for the appellate courts of a State, in this instance Florida, to maintain two different standards—one in civil cases and another in workmen's compensation cases—is even worse. In essence

respondent Thomas asserts that the dual standards are proper because a workmen's compensation hearing is an administrative procedure and benefits from a statutory provision that such hearings shall be reported.

However, the Supreme Court of Florida has several times held to the effect that in workmen's compensation cases a Judge of Industrial Claims is on a par with a Circuit Judge and that the Industrial Relations Commission is at the level of a District Court of Appeal.

In *Pierce v. Piper Aircraft Corporation*, 279 So.(2d) 281 (1973), the Supreme Court of Florida in a unanimous decision stated:

> "In 1971, the Industrial Relations Commission began a new era when the Governor reorganized it into the fashion of a court. Legislative sanction was given to this reorganization by Section 20.17(7), Florida Statutes, F.S.A., which creates an Industrial Relations Commission, providing, in pertinent part,
>
> '(7) There is created within the department of commerce an industrial relations commission to consist of a chairman and two other members all to be appointed by the governor, with the advice and the consent of the senate, and all to serve full time. Not more than one appointee shall be a person who, on account of his previous vocation, employment, or affiliation, shall be classified as a representative of employers; and not more than one such appointee shall be a person who, on account of his previous vocation, employment, or affiliation, shall be classified as a representative of employees. *Each appointee shall have the qualifications required by*

BLEED THROUGH

law for circuit judges. . . .
(emphasis supplied)'

The Commissioners are now required to be full-time and to have been members of The Florida Bar for at least five years. They have research assistants and operate much like our District Courts of Appeal. Also, Judges of Industrial Claims (formerly Deputy Commissioners) have consequently been elevated in the sphere of workmen's compensation to a status somewhat akin to circuit judges. The process from the time the claim is filed through the time petition for writ of certiorari is filed with this Court has become more judicial in nature since the 1971 reorganization. In view of these facts, particularly the fact that the Commissioners are now full-time lawyers, we feel compelled to reevaluate our prior decisions of Ball v. Mann, supra, Hardy v. City of Tarpon Springs, supra, and Brown v. Griffin, supra, respecting requirements imposed upon the Judge of Industrial Claims in making his findings of fact. Recognizing the tremendous magnitude of the caseload on Judges of Industrial Claims and in light of the new posture of the Commission, we have decided to reexamine the stringent requirements for findings of fact set forth in the above cited decisions of this Court. We now hold the Judge of Industrial Claims need make only such findings of ultimate material fact upon which he relies, as are sufficient justification to show the basis of an award or a denial of the claim."

In *Scholastic Systems, Inc. v. LeLoup*, 307 So.(2d) 166 (1975), the Supreme Court of Florida further stated:

"We recently treated the IRC as a judicial body in our opinion at 285 So.2d 601 (Fla. 1973), adopting its

Workmen's Compensation Rules of Procedure. In our opinion we delineated the review of workmen's compensation cases by the IRC as 'judicial' and expressly recognized the judicial nature of its function. The federal court system has both 'Article I courts' and 'Article III courts,' an example of the former being the tax court. A body may be a 'court' without being named within the constitutional article dealing with the judiciary (in the case of our state constitution, Art. V), so long as it fulfills the requirements making it a judicial body of review. Our task is to determine what *qualities* are necessary in order for a body exercising judicial functions to meet constitutional requirements. Black's Law Dictionary, Rev. 4th Ed., informs us that such a body is: (p. 425)

> 'A tribunal officially assembled under authority of law at the appropriate time and time, for the administration of justice. In re Carter's Estate, 254 Pa. 518, 99 A.58.
>
> 'An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in due course of law at times and places previously determined by lawful authority, Isbill v. Stovall, Tex.Civ.App., 92 S.W. 2d 1067, 1070.'

and further at p. 426 as:

> '. . . having power and authority of law at the time of acting to do the particular act. Ex parte Plaistridge,

BLEED THROUGH

68 Okl.256, 173 P.646,647.'

The term 'judicial function' is defined by Ballentine's Law Dictionary as: (p. 685)

'A function exercised by the employment of judicial powers.'

And in turn, 'judicial power' is defined as: (p. 686)

'That part of the sovereign power which belongs to the courts or, at least, does not belong to the legislative or executive department.'

Measured by these standards, the Industrial Relations Commission easily fits within these definitions as a judicial tribunal meeting constitutional requirements."

* * *

"In addition to the statutory provisions of F.S. § 20.17(7) noted by Mr. Justice Roberts in the above quote, we would further point out that F.S. § 440.44(4) provides: 'No person shall be appointed judge of industrial claims who is not an attorney-at-law admitted to practice in this state.' and that the recently concluded session of the Legislature increased the salary of the members of the Industrial Relations Commission so that it is now equivalent to that paid to judges of the district courts of appeal, by amending F.S. § 440.441. This same act (Ch. 74-363, Senate Bill 873) also amended (F.S. § 20.17(7) to provide that each appointee to the Industrial Relations Commission 'shall have the qualifications required by law for judges of the district courts of appeal,' rather than those of circuit judges as previously required, thus further 'upgrading' the status of the IRC to the level of an appellate court.

> All of the provisions make eminently clear the legislative intent to elevate the status of the IRC to that of a judicial body. That intent has been studiously carried out and its able 'judges' have been most carefully screened and chosen for the highest qualifications in this specialized field of the law. The IRC now occupies a position in the structure of our state government equivalent to the 'Article I' courts found in the federal system. The lack of the word 'court' in its title is irrelevant; the Board of Tax Appeals was no less a judicial body before its title was changed to that of 'Tax Court of the United States.' As Shakespeare said: 'What's in a name? That which we call a rose by any other name would smell as sweet.' We conclude, then, that whatever its title, the Industrial Relations Commission fulfills the requirements of a judicial body of review."

Again, in *Colvin v. State, Department of Transportation,* 311 So.(2d) 366 (1975), the Supreme Court of Florida expressed the following:

> "Where the IRC[1] is placed on the level of an 'appellate court' in the review of JIC[2] actions, as it has been by our holding in *Scholastic Systems,* it follows as with DCA[3] appeals that the actions of the 'trial court' (JIC) arrive in the appellate court (IRC) with a presumption of correctness. JIC findings and awards or denial

---

1 IRC is Industrial Relations Commission

2 JIC is Judge of Industrial Claims

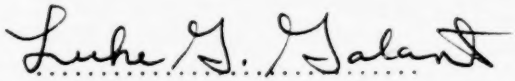
3 DCA is District Court of Appeal

> thereof can be overthrown only if not well founded under applicable legal principles, which would include a misapplication of applicable law, or upon a showing of a lack of competent evidence to support the findings or the ruling of the trial judge. IRC affirmance when there is such a lack of evidence, or reversal where the evidence is in fact sufficient, would constitute a 'departure from the essential requirements of law' which would vest jurisdiction for certiorari in the Supreme Court. It is upon the latter basis that this review has been granted.
>
> [3] The IRC, like the DCA, cannot be permitted to substitute its judgment on matters of discretion where there is sufficient proof in the record to support the trial judge's findings and rulings, even though the appellate view of the matter might have been different had the IRC been in the position of the trial judge. Applying this rule to the present case, it is apparent that IRC has fallen into that temptation which has in the past befallon appellate courts, of substituting its 'better judgment' for that of the 'errant trial judge' which is not permitted."

In view of the foregoing it is urged that to apply a different standard in workmen's compensation hearings from that found in civil trials is a denial of equal protection, over and above a denial of due process.

It should also be pointed out that *Liebe v. Morris, Lieb, Inc.* and *Wardell v. Tropicana Products, Inc.*, relied upon by respondent Thomas arose before the Judge of Industrial Claims and the Industrial Relations Commission were "upgraded."

Respectfully submitted,



LUKE G. GALANT
320 East Adams Street
Jacksonville, Florida 32202
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished to Edward A. White, Esquire, by mail, this 1st day of April, 1976.

Attorney